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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO CARLOS GONZALEZ,

Defendant and Appellant.

F076877

(Super. Ct. No. F17906181)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Michael G. Idiart, Judge.

Joshua G. Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen, Deputy Attorney General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Peña, J. and DeSantos, J.

Appellant Antonio Carlos Gonzalez pled no contest to unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)/count 1) and admitted three prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).<sup>1</sup> Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we determined that portions of Gonzalez's sentence are unauthorized.<sup>2</sup> Therefore, we modify the judgment to correct the unauthorized portions and affirm as modified.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On October 18, 2017, I. Perez reported that his 2012 Toyota Tundra had been stolen from in front of a doughnut shop in King City. The following day, police officers found the Tundra and Gonzalez at a gas station. The truck had run out of gas and Gonzalez was begging for money. After the officers arrested him, Gonzalez admitted taking the truck after finding it in front of the doughnut shop, unlocked and running with the keys in the ignition.

On October 20, 2017, the Fresno County District Attorney filed a complaint charging Gonzalez with unlawful driving or taking of a vehicle (§ 10851, subd. (a)/count 1), receiving a stolen vehicle (§ 496d, subd. (a)/count 2) and four prior prison term enhancements.

On December 8, 2017, Gonzalez entered his plea to unlawful driving or taking of a vehicle and three prior prison term enhancements in exchange for the dismissal of the remaining count and enhancement, a four-year lid, and the right to argue for a split sentence.

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<sup>1</sup> Further statutory references are to the Penal Code, unless otherwise indicated.

<sup>2</sup> On October 17, 2018, this court sent a letter advising the parties that they could file a brief addressing the issues discussed below.

The probation department in its report recommended the court sentence Gonzalez to an aggregate, local term of six years: the aggravated term of three years on the substantive offense, and three one-year prior prison term enhancements. The probation department also recommended, in pertinent part, that the court impose an \$1,800 restitution fine, a fine in the same amount if mandatory supervision was revoked, a \$40 court security assessment (§ 1465.8, subd. (a)(1)) and a \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). The court signed an acknowledgement in the report that it read and considered the report.

On January 9, 2018, the court suspended imposition of the three prior prison term enhancements and sentenced Gonzalez to a local, upper term of three years on his unlawfully taking a vehicle conviction. The court, however, did not split the sentence between custody time and mandatory supervised release. Additionally, the court imposed and suspended a \$1,800 restitution fine (§ 1202.4, subd. (b)), a \$1,800 mandatory supervision revocation fine (§1202.45, subd. (b)), a \$40 court operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)).

On January 10, 2018, Gonzalez filed a timely notice of appeal.

Gonzalez's appellate counsel filed a brief that summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) However, in a letter filed on July 5, 2018, Gonzalez contends his plea agreement provided for a split sentence and placement in a drug rehabilitation program and that he was not sentenced in accord with the agreement. Gonzalez is wrong. The reporter's transcript of the change of plea proceedings and his written plea agreement unequivocally indicate that his plea bargain provided for a four-year lid and that Gonzalez *could argue for a split sentence*. The transcript also does not

indicate that placement in a drug rehabilitation program was a condition of his negotiated plea.

Further, “[s]ection 667.5[, subdivision] (b) provides for an enhancement of the prison term for a new offense of one year for each ‘prior separate prison term served for any felony,’ .... Once the prior prison term is found true within the meaning of section 667.5[, subdivision] (b), the trial court may not stay [or suspend] the one-year enhancement, which is mandatory unless stricken.” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Thus, the court imposed an unauthorized sentence when it suspended the three prior prison term enhancements Gonzalez admitted.

The parties contend the appropriate remedy is to remand the matter to allow the trial court to impose the enhancements or strike them with a statement of reasons for doing so. However, the court’s acceptance of the plea bargain and its failure to impose any of the enhancements even though it could have imposed at least one under the plea agreement indicates it is unlikely the court would impose any of these enhancements if the matter were remanded to the trial court. Therefore, in the interest of judicial economy we decline the parties’ request to remand the matter.

Additionally, our review of the record disclosed that portions of Gonzalez’s sentence regarding restitution, fines, and fees were unauthorized.

Section 1202.4, subdivision (f), provides:

“... in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, .... If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution.”

Although the probation report indicated that victim restitution was an issue in the instant case, the court did not address this issue during Gonzalez’s sentencing hearing.

Thus, the court imposed an unauthorized sentence by its failure to issue an order addressing victim restitution and we will add to the judgment a restitution order requiring that the amount of victim restitution be determined at the direction of the court.

The court also imposed an unauthorized sentence when it suspended the \$1,800 restitution fine, the \$40 court operations assessment, and the \$30 court facilities assessment. Each of the statutes that authorize these fines and assessments states the court “shall” impose the pertinent fine or assessment.<sup>3</sup> “Shall” is mandatory. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123 [“Use of the mandatory language ‘shall’ indicates a legislative intent to impose a mandatory duty; no discretion is granted.”].) Further, we are not aware of any legal authority that allows a trial court to suspend any of these fines or assessments.

During Gonzalez’s sentencing hearing, the court’s only statement with respect to the above noted fines and fees was, “I’m going to suspend your fines and fees.” Gonzalez relies on this singular reference to fines and fees to contend the court did not impose a restitution fine. He further contends a restitution fine was discretionary because the court could decline to impose this fine if it found “compelling and extraordinary reasons for not [imposing it].” (§ 1202.4, subd. (b).) Thus, according to Gonzalez, because the fine is discretionary and the People did not object in the trial court to the court’s failure to impose a restitution fine, they forfeited any objection to the omission of this fine. We disagree.

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<sup>3</sup> Section 1465.8, subdivision (a)(1), provides: “To assist in funding court operations, an assessment of forty dollars (\$40) *shall* be imposed on every conviction for a criminal offense[.]” (Italics added.) Government Code, section 70373, subdivision (a)(1), provides: “To ensure and maintain adequate funding for court facilities, an assessment [of \$30] *shall* be imposed on every conviction for a criminal offense[.]” (Italics added.) Section 1202.4, subdivision (b), provides: “In every case where a person is convicted of a crime, the court *shall* impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” (Italics added.)

The probation department recommended the court impose only two fines, a \$1,800 restitution fine and a fine in the same amount if mandatory supervision was revoked (§ 1202.45). It is clear from this recommendation and the court’s acknowledgment that it read and considered the probation report that the court’s reference to “fines” was a reference to the restitution fine and the mandatory supervision revocation fine the report recommended the court impose. Because the court could not suspend these fines without first imposing them, it is also clear that the court implicitly imposed both these fines before it suspended them.

Since Gonzalez was convicted on one count and the probation department recommended a six-year term, it is apparent that the department arrived at the \$1,800 amount by using the formula in section 1202.4 which provides:

“In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine [of \$300] pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.”<sup>4</sup> (§ 1202.4, subd. (b)(2).)

Further, the trial court’s adoption of the probation department’s recommendation of an \$1,800 restitution fine clearly indicates that it also intended to use this formula, but that it neglected to recalculate the amount based on the three years it actually imposed. Therefore, rather than remanding the matter to the trial court for it to make this calculation, in the interest of judicial economy, we will also reduce the restitution fine to \$900.<sup>5</sup>

Moreover, section 1202.45, subdivision (b) requires the court to impose a suspended mandatory supervision parole revocation fine “[i]n every case where a person

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<sup>4</sup>     \$300 x 6 [years] x 1 [conviction] = \$1,800.

<sup>5</sup>     \$300 x 3 [years] x 1 [conviction] = \$900.

is convicted of a crime and is subject to ... mandatory supervision[.]”<sup>6</sup> Gonzalez’s sentence, however, did not provide for a period of mandatory supervision. Thus, the court’s imposition of a suspended mandatory supervision revocation fine was also unauthorized.

Further, following an independent review of the record, we find that, with the exception of the issues discussed above, no reasonably arguable factual or legal issues exist.

### **DISPOSITION**

The judgment is modified to strike the stayed mandatory supervision revocation fine (Pen. Code, § 1202.45, subd. (b)) the court imposed and the three prior prison term enhancements Gonzalez admitted. The judgment is further modified to include an unstayed restitution fine of \$900 (Pen. Code, § 1202.4, subd. (b)), an order that the amount of victim restitution shall be determined at the direction of the court (Pen. Code, § 1202.4, subd. (f)), an unstayed \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), and an unstayed \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)). The trial court is directed to prepare an amended abstract of judgment that incorporates these modifications and to forward a certified copy to the appropriate authorities. As modified, the judgment is affirmed.

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<sup>6</sup> Section 1202.45, subdivision (b) provides: “In every case where a person is convicted of a crime and is subject to ... mandatory supervision ..., the court shall, at the time of imposing the restitution fine ..., assess an additional ... mandatory supervision revocation restitution fine in the same amount as [the restitution fine] ....”